Sweetener Supply Corporation *and* International Brotherhood of Teamsters, Local 705, Petitioner. Case 13–RC–21492

May 23, 2007

DECISION AND DIRECTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and an objection in a second election held on July 14, 2006,[1] and the hearing officer's report (pertinent portions of which are attached as an appendix) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 9 for and 7 against the Petitioner, with 7 determinative challenged ballots.[2]

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The primary issue is whether or not employees Michael Pew, Mark Pelafas, and David Cohen were eligible to vote in the July 14 election. The eligibility cutoff date for the election was June 18. The Employer timely submitted an updated *Excelsior* list that included the names of Pew, Pelafas, and Cohen. At the election, however, the Board agent stated that the updated *Excelsior* list was not in the file and that she would use instead the list from the first election. The Board agent challenged the ballots of Pew, Pelafas, and Cohen on the basis that their names were not on that list.

For the reasons that follow, we reverse the hearing officer's recommendations to sustain the challenges to the ballots of Pew, Pelafas, and Cohen.[3]

At the hearing, Dorey A. McCarty, general manager of operations for the Employer, testified that Pew, Pelafas, and Cohen started their employment on the eligibility cutoff date, Sunday, June 18. McCarty testified that the employees were required to undergo training on June 18. Time records showed that each of the employees was paid for 5 hours. No evidence was introduced to show that the employees performed no bargaining unit work that day.

The hearing officer found that on June 18 all three employees were in training but did not perform any bargaining-unit work and were therefore ineligible to vote. Accordingly, the hearing officer recommended sustaining the challenges to the ballots of the three employees. The Employer excepts.

To be eligible to vote, an individual must be "employed and working" in the bargaining unit on the eligibility date, unless absent for certain specified reasons. *Dyncorp/Dynair Services*, 320 NLRB 120 (1995). The Board defines "working" as the actual performance of bargaining-unit work. Id. "Working" does not include training that consists solely of "orientation and preliminaries." *Pep Boys-Manny, Moe & Jack*, 339 NLRB 421 (2003). "Working" does include, however, the performance of bargaining unit work during on-the-job training. Id.

The hearing officer found that there was no evidence that Pelafas, Pew, or Cohen performed any bargaining-unit work on June 18. Accordingly, she concluded that none of the three employees performed bargaining-unit work during the eligibility period. However, the burden of proof rests on the party seeking to exclude a challenged individual from voting. See, e.g., *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). Although the Board agent challenged the ballots of Pew, Pelafas, and Cohen, it is the Petitioner as the party seeking to establish their ineligibility that bears the burden of proof. See *Arbors at New Castle*, 347 NLRB 544, 545–546 (2006) (although the Board agent challenged employee Gibson because her name was not on the eligibility list, it was the petitioner seeking to establish Gibson's ineligibility that had the burden to so prove). Thus, the burden is on the Petitioner to show that the challenged employees did not perform bargaining-unit work, not on the Employer to show that they did. McCarty's testimony establishes that the employees were in training on June 18. But neither McCarty's testimony nor any other evidence establishes that these employees

[1] All dates herein are 2006. The first election was conducted on June 7; the hearing officer inadvertently stated the date as June 6. The parties stipulated that election be set aside and a second election conducted.

[2] The parties entered into a stipulation not to count the ballots of two of the challenged voters.

[3] We adopt, for the reasons stated by the hearing officer, her recommendation to overrule the Employer's objection to the Board agent's use of the eligibility list prepared for the first election. The Employer also submits that the Board should not reach the merits of the Pew, Pelafas, and Cohen challenges because, had the Board agent used the updated *Excelsior* list that included their names, the agent would not have challenged them. We reject this argument, as did the hearing officer. The fact of the matter is, they were challenged, and their ballots are determinative. We must therefore resolve those challenges, regardless of what may or may not have happened had the revised list been used.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the challenge to the ballot of Debra Galvin and to sustain the challenge to the ballot of Steve Ohlrich.

Members Schaumber and Kirsanow find it unnecessary to pass on the Employer's alternative contention that employee David Cohen was eligible to vote as an employee who had previously worked for the Employer before being incarcerated, and who had a reasonable expectancy of returning to work after his incarceration. As the challenge to Cohen's ballot is overruled on other grounds, this argument need not be addressed.

did *not* perform any bargaining-unit work on June 18, either as part of the training or in addition to the training. The Petitioner has failed to meet its burden.[4] Accordingly, the challenges are overruled.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 13 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Michael Pew, Mark Pelafas, David Cohen, and Debra Galvin. The Regional Director shall thereafter prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

APPENDIX

HEARING OFFICERS' REPORT ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION WITH FINDINGS AND RECOMMENDATIONS

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The Challenged Ballots

The Board agent challenged the ballots of Michael Pew, Mark Pelafas, David Cohen, and Steve Ohlrich on the basis that their names were not on the *Excelsior* list[1] (*Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966)). The Petitioner challenged the ballot of Debra Galvin on the basis that she is an office clerical and does not share a community of interest with the bargaining unit employees.

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David Cohen

The Employer contends that David Cohen is an eligible voter and the challenge to his ballot should be overruled. The Petitioner contends that he is not eligible, as he was not hired until after the payroll cutoff date.

Facts

Cohen, McCarty's brother, was an employee of the Employer prior to being incarcerated.[2] According to McCarty, Cohen had to be cleared for work and permission obtained for him to travel across State lines to work for the Employer after his release.

McCarty testified that Cohen was released shortly before the payroll cut off date of June 18. When McCarty talked with Cohen about returning to the Employer, he offered Cohen $12 per hour and told Cohen that since he was training other employees on June 18 Cohen could join them. Cohen accepted and punched in on June 18; he was paid for 5 hours for that day.

McCarty testified that the training consisted of going through the Employer's requirements and good manufacturing processes (GMPs), which was extensive. A movie was also shown. There is no evidence that Cohen performed any bargaining unit work on June 18.

Analysis

The Employer contends that Cohen is eligible on three grounds. The first is that Cohen had an expectation of returning to work after his incarceration. The Employer further contends that Cohen was working on the day of the payroll cut off date and was also working on the day of the election, satisfying the Board's requirement for eligibility to vote under *Excelsior Underwear, Inc.* The Employer also contends that, because the wrong list was used at the election, his ballot is valid.

To support its argument that Cohen had an expectation of returning, the Employer cites a judge's decision, *Chicago Future, Inc.,* JD–23–03 (2003). In that case, the employee, Alfredo Batunfbakal, was challenged on the grounds that he was not an eligible voter. The judge found that he was eligible because he had an expectation of returning to the Employer after his incarceration. Based on the evidence, that period was treated as a leave of absence, his health insurance premiums were paid by the Employer, and a temporary employee was hired to replace him. He also continued to have contact with the Employer. Prior to his incarceration, he had worked for the Employer for 6 years.

In the instant case, no evidence was presented at hearing that Cohen requested or was granted a leave of absence, or that he was treated as an employee on a leave of absence or on layoff. No evidence was presented that he was retained on the payroll, that any of his benefits continued, or that he was replaced by another employee, whether temporary or permanent, all the elements that the judge relied on in *Chicago Future*, supra. McCarty testified that he was in contact with his brother, but I

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[4] *Harold J. Becker Co.*, 343 NLRB 51 (2004), in which the Board placed the burden of proof on the nonchallenging party to establish voter eligibility, is distinguishable. There, the petitioner as the challenging party had established, as an initial matter, that the challenged employees were employed in positions explicitly excluded from the stipulated bargaining unit. The employer responsively asserted that the disputed employees were eligible to vote because they were dual-function employees. Under those circumstances, the Board placed the burden on the employer to rebut the petitioner's initial showing that the disputed employees should be excluded from the unit. Id. at 52 fn. 6 ("Because the [e]mployer has created the issue by asserting 'dual function,' it therefore has the burden of proving that the employees should be included on that basis."). Here, however, the Petitioner failed to sustain its initial burden of establishing the ineligibility of the three disputed employees.

In Member Liebman's view, *Harold J. Becker* is on point. It is undisputed that Cohen, Pew, and Pelafas were in training on June 18. Under Board law, this demonstrates, as a threshold matter, their ineligibility to vote. Accordingly, the burden shifts to the Employer to show that the trainees' activities that day included bargaining-unit work, and here, the Employer made no such showing. Member Liebman would thus adopt the hearing officer's finding that the three trainees were not eligible to vote.

[1] The Employer filed an objection that the incorrect Excelsior list was used at the election, which will be discussed below.

[2] McCarty did not testify as to how long Cohen worked for the Employer prior to his incarceration

do not find that establishes Cohen's expectation of returning to the Employer. Thus, I do not find that he had a reasonable expectation of returning to the Employer at the time of his incarceration.

The second argument, that he was on the payroll on the payroll cutoff date as well as the day of the election to make him eligible, must also fail. The evidence establishes that Cohen was working the day of the election. However, Cohen reported on June 18, for which he was paid, but he did not perform any bargaining unit work. Rather, the evidence presented at hearing showed that he attended a mandatory training session along with newly hired employees Pew and Pelafas. The Board has held in *Dyncorp/Dynair Services,* 320 NLRB 120 (1995), that in order to be eligible to vote, the employee must be employed *and* (emphasis added) performing bargaining unit work during the payroll period, including the payroll cutoff date, unless absent for certain reasons. The day that Cohen reported, June 18, was the last day of the eligibility period. On that day, I find that he was in training and did not perform bargaining unit work.

The third argument is that since the wrong list was used, Cohen is eligible. I find that whether or not the correct list was used is not dispositive of Cohen's eligibility, as he appeared at the polls and voted, albeit under challenge. Based on all the above, I find Cohen is not eligible to vote and I recommend that the challenge to his ballot be sustained.

Mark Pelafas and Michael Pew[3]

The ballots of Mark Pelafas and Mike Pew were challenged by the Board agent on the basis that their names did not appear on the *Excelsior* list used at the election. The Employer contends that the Pew and Pelafas are eligible because they were employed on the payroll cutoff date and the day of the election, and that since the wrong list was used at the election, their ballots are valid. The Petitioner argues that they are not eligible, as they did not work for the Employer as regular part-time employees. I find that they are not eligible voters and I recommend that the challenges to their ballots be sustained.

Facts

Both employees attended the same training on June 18 with David Cohen. That date was also the first day that Pew and Pelafas appeared on the payroll for the Employer and they were paid for 5 hours. The evidence presented fails to establish that they performed any bargaining unit work that date, but, according to McCarty, received the same training including the movie, that Cohen received.

Analysis

As noted above, the Board has held in *Dyncorp/Dynair Services,* supra, that in order to be eligible to vote, the individual must be employed and performing bargaining unit work during the payroll period, unless absent for certain reasons. The evidence established that Pelafas and Pew were in training and no evidence was presented that they performed any bargaining unit work. The Employer also argues that they are eligible because the wrong list was used. As in the case of Cohen, I find that whether or not the correct list was used is not dispositive of Pew's and Pelafas' eligibility as they too appeared at the polls and voted under challenge. The testimony of the Union's witness, Tim Tatum, that he would have challenged them had their names been on the list, is self-serving and speculative at best and cannot be relied on. Based on the above, I find Pew and Pelafas are not eligible to vote and I recommend that the challenges to their ballots be sustained.

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THE OBJECTION

Positions of the Parties

The Employer filed an objection to the conduct of the election contending that the Employer timely filed with the Region, by fax, a copy of the updated *Excelsior* list for the rerun election. The remedy sought is a new election if the revised tally shows that the Petitioner has a majority. In its brief, the Employer requests that the Board adopt a per se rule to invalidate an election when an incorrect eligibility list is used. The Petitioner contends that the objection is irrelevant, as the employees who were left off the updated list would have been challenged by the Petitioner even if they had been on the list.

Based on the evidence, the demeanor of the witnesses, and relevant case law, I recommend that the objection be overruled as the Employer failed to prove that the Board did not receive the list or that it failed to provide it timely to the Petitioner. Based on the evidence, I do not find that the use of the *Excelsior* list interfered with the conduct of the election.

Facts

As noted above, the parties entered into a Stipulation to Set Aside the Election and agreed to rerun the election, which was approved on June 23, with the *Excelsior* list due no later than June 30 in the Regional Office. The stipulation provided that a second election was to be conducted on July 14, and the payroll cutoff eligibility date was June 18.

The Employer presented Steve Safford, a systems administrator for the Employer, who is familiar with the fax machines at the Employer's offices. He testified that the updated *Excelsio*r list was faxed on June 30 at 3:24 p.m. and that it was received by the Board, according to the fax receipt, Employer Exhibit 2. The fax log, Employer Exhibit 3, showed that it was faxed by Edgar Palencia, manager of the file room. Although there is a three-number prefix to the fax number of the Board office, Safford testified that this number is a job code for the cost accounting, not an area code for the telephone number. The Petitioner did not cross-examine Safford.

Tim Tatum, the Petitioner's observer, testified that the Board agent informed the parties at the rerun election there was no updated list in the file and stated the previous list would be used. Tatum further testified that Employer Attorney Mike Klupchek did not object to the use of the first list for that election. He testified that he heard Klupchek say the Employer had sent another list but that Klupchek also said he was willing to go through with the election using the first *Excelsior* list. Klupchek made an offer of proof on the record that, when the

[3] The record reflects that Pew left the Employer in early August.

Board agent said that the original list was the only list she had in the file and that was the list they were using, he had no option but to go ahead with the election.

Analysis

The Board has held that in order to set aside an election on the basis of Board agent misconduct, the Board must be presented with facts raising a "reasonable doubt as to the fairness and validity of the election." *Smithfield Packing Co.,* 344 NLRB 1 (2004); *Rheem Mfg. Co*., 309 NLRB 459 (1992). In this case, the Employer contends that the Board agent's use of the incorrect eligibility list interfered with the rights of the voters as well as the laboratory conditions required for a fair and free election. The remedy sought by the Employer is to have a rerun election if the Union wins.[4]

According to the Case Handling Manual (CHM) Section 11312.1, the Employer is requested to prepare a list of full names and addresses of eligible voters as of the payroll period contained, in this case the stipulation to set aside the election. For the rerun election, the list is updated to reflect those employees in the bargaining unit as of the payroll cutoff date in the stipulation. The Regional Director is to make the list available to all parties in the case. *NLRB v. Wyman-Gordon* Co., 394 U.S. 759 (1969), *Excelsior Underwear*, supra. The Rules and Regulations provide that the list may be faxed to the parties. The *Excelsior* rule is not intended to test employer good faith or level the playing field between petitioners and employers, but to achieve important statutory goals by ensuring that all employees are fully informed of the arguments concerning representation and can freely and fully exercise their Section 7 rights. *J. P. Phillips, Inc.*, 336 NLRB 1279 (2001); *Mod Interiors, Inc*., 324 NLRB 164 (1997).

Immediately upon receipt of the list, the Region should mail to all petitioners the list, which can also be faxed or picked up, according to CHM Section 11312.2. In the CHM, Section 11318, any last minute changes are to be discussed at the preelection conference.

The evidence establishes that the Employer complied with submitting a complete list to the Region in a timely fashion. The Employer presented no evidence that the Region did not receive it, or that the Region did not forward it to the Petitioner. The Petitioner did not present evidence that it contacted the Region concerning the whereabouts of the updated list. The only evidence presented was the Board agent's statement at the election that the updated list was not placed in the file and therefore she was using the list from the first election. This is not a case where the Board ordered a new election because the updated list was received after the due date, *Alcohol & Drug Dependency Services,* 326 NLRB 519 (1998); *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973). This is not a case were the Board sent the list to the Petitioner late, *J. P. Phillips Inc.,* supra; *Alcohol & Drug Dependency Services*, supra, or that it was incomplete, *Special Citizens Futures Unlimited,* 331 NLRB 160 (2000). The issue to be considered is whether the Board's failure to have the updated list in the file for the rerun election, but continued with the election using the former list, resulted in an invalid election.

There was no evidence presented that the Board did not receive the list, and in fact, the evidence presented by the Employer shows that the Board did in fact receive it. Therefore, I must conclude that the Board received the list. There is no evidence that the Board agent, after the due date for receipt of the list passed, asked the Employer to resubmit the list or contacted the Employer about its failure to submit the list. There was no evidence presented that the Board did not forward the list to the Petitioner. Therefore, I must conclude that the Board received the list and forwarded it to the Petitioner. There was no evidence presented that the Petitioner did not receive the updated list. There was no evidence presented to establish that, after the deadline of the submission of the updated list passed, the Petitioner inquired of any Board agent concerning the whereabouts of the updated list. Therefore, I must conclude that the Petitioner did in fact receive the list. The only evidence presented is a hearsay statement of the Board agent at the time of the election that the updated list was not in the file, and that the Board Agent decided to conduct the election using the first list, according to the CHM. The fact that the updated list was not in the file is not conclusive that the Board did not receive it or that it was not sent to the Petitioner. There is no evidence on the record that the Petitioner objected to the use of the old list or contended at the preelection conference that it did not receive it. The evidence did establish that although the Employer commented on its use, the Employer went forward with the election using the old list. There is no evidence that, at the preelection conference, the Employer raised the issue of the three employees whose names were not on the former list, should be added and that they were eligible or that the parties discussed their eligibility. I therefore find that the use of the list used in the original election did not destroy the laboratory conditions of the election or that the use of that list interfered with the conduct of the election. I also find that the Board agent's use of the list from the first election did not constitute Board agent misconduct as the CHM provides that an election would go forward even without the list. I recommend, therefore, that the objection be overruled.

RECOMMENDATION

Based on the record, I recommend that Michael Pews, Mark Pelafas, David Cohen, and Steve Ohlrich are not eligible to vote and that the challenges to their ballots be sustained. Having concluded that the Employer's objection to the election does not raise material or substantial issues with respect to the conduct affecting the results of the election, I recommend that the objection be overruled. I further recommend that the challenge to Debra Galvin's ballot be overruled.

[4] The Employer does not present a remedy if the Union loses the election.